

**No. ED99038**

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**IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

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**SAXONY LUTHERAN HIGH SCHOOL, INC.,**

**Respondent,**

**v.**

**MISSOURI LAND RECLAMATION COMMISSION and  
STRACK EXCAVATING, LLC,**

**Appellants.**

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**Appeal from the Cape Girardeau County Circuit Court  
The Honorable William L. Syler, Presiding Judge**

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**BRIEF OF APPELLANT MISSOURI LAND RECLAMATION  
COMMISSION**

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## **JURISDICTIONAL STATEMENT**

This is a civil action for judicial review of a decision by the Missouri Land Reclamation Commission (“Commission”) to issue a permit to Strack Excavating, LLC (“Strack”), containing a permit condition. As conditioned, the permit would allow the company to operate a limestone quarry in Cape Girardeau County. This matter involves a contested case authorized by § 444.789 RSMo. Under § 444.773.4 RSMo, the Commission’s decision is subject to judicial review as provided in Chapter 536 RSMo.

Saxony Lutheran High School, Inc. (“Saxony”) filed a petition in the Circuit Court of Cape Girardeau Circuit Court against the Missouri Department of Natural Resources and the Missouri Land Reclamation Commission, seeking judicial review of the Commission’s decision. The Circuit Court reversed the Commission’s decision, vacated the permit, and remanded the matter to the Commission with the direction to comply with the provisions of § 444.771 RSMo.

This appeal is authorized by § 512.010(5) RSMo. This appeal lies in the general jurisdiction of the Missouri Court of Appeals because this appeal involves no matter over which the Supreme Court has exclusive jurisdiction under Article V, § 3, of the Missouri Constitution, 1945. Cape Girardeau County is within the jurisdictional territory of the Eastern District under §§ 477.050-477.070 RSMo.

## INTRODUCTION

When the Governor signed House Bill 89 into law and it went into immediate effect on July 11, 2011, the parties to this appeal had already conducted three days of a contested case hearing on Strack's permit application pursuant to § 444.773.3 RSMo. House Bill 89 enacted § 444.771 RSMo, which prohibits the Commission from issuing a land reclamation permit to any new quarry with a mine plan boundary within 1,000 feet of an accredited school that had been in that location for at least five years. Strack complied with § 444.771 RSMo by immediately filing a motion in which it agreed to a revised mine plan boundary consistent with the new law. The Commission likewise complied with legislature's directive and issued the land reclamation permit to Strack with the revised mine plan boundary.

Saxony challenges the Commission's authority to apply House Bill 89 to Strack's permit and to impose permit conditions, even though the permit condition in this instance operated to Saxony's benefit. The Commission's authority was derived directly from the legislature, with the passage of House Bill 89. The Commission simply applied the law to the pending permit application, after affording Saxony a full and fair hearing, and avoided wasting the time and resources required for Strack to submit a new permit application and go through another hearing process on the same, albeit smaller, mine plan. Additionally, the Commission is authorized to take

action after a public hearing by § 444.773.3 RSMo, to resolve the public's concerns.

Saxony also argues that the Commission should have required Strack to publish a second public notice to reflect the reduction in the mine plan acreage caused by the Commission's permit issuance. A second public notice was not required for the same mine plan acreage that was covered by the first public notice, and even it was, there was no prejudicial error to Saxony, which had its full and fair hearing, or the public, who had an opportunity to request a hearing after the first public notice.



## STATEMENT OF FACTS

On July 11, 2011, the Governor signed House Bill 89 into law, effective immediately, which created a new § 444.771 RSMo:

444.771. Notwithstanding any other provision of law to the contrary, the commission and the department *shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property when an accredited school has been located for at least five years prior to such application for permits made under these provisions*, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation. [Emphasis added.]

Prior to the enactment of House Bill 89, the following events had already occurred:

- Strack submitted its permit application for a land reclamation permit on November 4, 2010.<sup>1</sup>

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<sup>1</sup> L.F. at 125; Respondent's Exhibit 1.

- The Director of the Land Reclamation Program determined that Strack's permit application was complete and compliant with the Land Reclamation Act and its regulations.<sup>2</sup>
- Strack had published a public notice of the permit application as required by § 444.772.10 RSMo, setting forth the name and address of the operator, a legal description of the county, section, township and range, the number of acres involved, a statement that the operator plans to mine a specified mineral during a specified time, and the Commission's address.<sup>3</sup>
- Saxony requested a public hearing on Strack's permit application pursuant to § 444.773.3 RSMo. The Commission granted Saxony's hearing request on February 7, 2011, with respect to the issues of whether Saxony's health and livelihood will be unduly impaired by the issuance of the permit.<sup>4</sup>
- The Commission assigned a hearing officer to hold a contested case hearing pursuant to §§ 444.773.3 and 444.789 RSMo.<sup>5</sup>

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<sup>2</sup> L.F. at 125; Respondent's Exhibit 2.

<sup>3</sup> L.F. at 125; Respondent's Exhibit 3.

<sup>4</sup> L.F. at 125.

<sup>5</sup> L.F. at 125-126.

- A contested case hearing was held on July 5, 6, and 7, 2011.<sup>6</sup>

After the enactment of House Bill 89 on July 11, 2011, Saxony rested its case on July 12, 2011 and filed a Motion for Accelerated Determination based upon House Bill 89.<sup>7</sup> In addition to a Motion for Directed Verdict, Strack filed a Memorandum Regarding Revision of Mine Plan Boundary<sup>8</sup> and a Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary,<sup>9</sup> in which it expressed its willingness and desire to have the permit application modified so that the mine plan boundary is not located within 1,000 feet of Saxony's real property boundary.<sup>10</sup> Strack argued that Saxony would not be prejudiced by a reduction in the amount of acres to be mined caused by this revision.<sup>11</sup>

The Hearing Officer issued a Recommended Order on August 24, 2011, in which he found Saxony had not met its burden of production under § 444.773.3 RSMo that its health or livelihood will be unduly impaired by the

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<sup>6</sup> L.F. at 127.

<sup>7</sup> L.F. at 127

<sup>8</sup> L.F. at 70.

<sup>9</sup> L.F. at 82.

<sup>10</sup> L.F. at 70.

<sup>11</sup> L.F. at 83-85.

issuance of the permit.<sup>12</sup> With respect to House Bill 89, the Hearing Officer explained that House Bill 89 requires “that for the subject application to be approved there must exist a buffer of one thousand feet between the northern boundary of the Saxony property and the southern mine plan boundary.”<sup>13</sup> The Hearing Officer concluded that it was possible to apply the 1,000 foot buffer to Strack’s permit application:

When HB 89 was signed into law, the Strack Application had already been deemed complete and compliant with the law that existed at the time it was filed. The Application was compliant with the law as it existed when approval was recommended by Respondent [Director of Land Reclamation Program] on January 11, 2011. Applicant’s Permit to Construct and water permit had previously been issued. The law now requires that the mine plan boundary not be within one thousand feet of the Saxony property. If the land on which Applicant was seeking to operate the proposed quarry was so small that the statutory standard could not be applied, then that fact would dictate that the application not be approved. That is not the case in this instance. The

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<sup>12</sup> L.F. at 135.

<sup>13</sup> L.F. at 120.

Strack property is of sufficient size that the legislative intent to create a buffer of one thousand feet between a mine plan boundary and the property of a school such as Saxony can be accomplished.<sup>14</sup>

Consequently, the Hearing Officer recommended that the Commission approve Strack's permit application "with the mine plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack-Saxony property line, in compliance with and as required by § 444.771 [sic] RSMo."<sup>15</sup> The practical effect of the permit issuance is that the acreage contained in the mine plan boundary was reduced from 76 acres to 53 acres.<sup>16</sup> The Hearing Officer also found that reducing the mine plan boundary did not result in a "significant or even material change in the public notice," which had been previously published. The Hearing Officer rejected Saxony's argument that a second public notice was required to reflect the reduction in acreage.<sup>17</sup>

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<sup>14</sup> L.F. at 142.

<sup>15</sup> L.F. at 145.

<sup>16</sup> L.F. at 144.

<sup>17</sup> L.F. at 144.

The Commission adopted the Hearing Officer's recommendation and issued its Final Order on September 22, 2011, incorporating in full the Hearing Officer's Findings of Fact and Conclusions of Law.<sup>18</sup> Saxony appealed the Commission's Final Order to the Cape Girardeau Circuit Court on the basis that the Commission did not have authority to impose the 1,000 foot buffer as a permit condition and that the Commission should have required a second public notice on the permit condition.<sup>19</sup> Saxony did not appeal the Commission's findings of fact and conclusions of law that Saxony will not be unduly impaired by the issuance of Strack's permit.<sup>20</sup> The circuit court entered judgment for Saxony and this appeal followed.<sup>21</sup>

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<sup>18</sup> L.F. at 150-151

<sup>19</sup> L.F. at 153.

<sup>20</sup> *Id.*

<sup>21</sup> L.F. at 221, 234 and 281.

## ARGUMENT

### A. Standard for Judicial Review

Judicial review of a “contested case” is governed by §§ 536.100 to 536.140 RSMo. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006). The court may not disturb a commission’s factual findings if they are supported by competent and substantial evidence on the whole record, viewing the evidence in the light most favorable to the findings, including all reasonable inferences that support them. *Hermel, Inc. v. State Tax Com’n*, 564 S.W.2d 888, 894 (Mo. 1978). If there is not competent and substantial evidence to support a commission’s findings, or if the findings are clearly contrary to the overwhelming weight of the evidence, then the court may reverse or order further appropriate action. *Scott Tie Co. v. Missouri Clean Water Com’n*, 972 S.W.2d 580 (Mo. Ct. App. 1998).

The court is not bound by the commission’s conclusions of law. The court’s review may extend to whether the commission’s action violated constitutional provisions; was in excess of its statutory authority or jurisdiction; was otherwise unauthorized by law; was made upon unlawful procedure or without a fair trial; was arbitrary, capricious or unreasonable, or involved an abuse of the commission’s discretion. *See* § 536.140.2 RSMo.

**B. House Bill 89 authorized the Commission to issue Strack's permit with a 1,000 foot buffer between Saxony's property boundary and Strack's mine plan boundary. (Responding to Saxony's Point I.)**

When House Bill 89 was enacted in the middle of the Strack/Saxony hearing, the Commission had two choices. After determining that Saxony would not be unduly impaired by the permit, the Commission could either deny Strack's permit application because it did not comply with the new law and make Strack start the entire process over, or it could apply the law to Strack's permit by including the 1,000 foot buffer, as agreed to by Strack during the hearing. The Commission chose the latter, which was consistent with the law and was not an abuse of discretion.<sup>22</sup>

The circumstances here are unique. Had House Bill 89 been enacted before Strack's permit application was submitted, the Land Reclamation Program would have ensured that Strack complied with the 1,000 foot buffer requirement before deeming the permit application complete and compliant with the Land Reclamation Act. In this case, however, House Bill 89 was not enacted until *after* Strack's permit application had been submitted and deemed complete and compliant with the Land Reclamation Act.<sup>23</sup> The public

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<sup>22</sup> L.F. at 141-142.

<sup>23</sup> L.F. at 142.



already had been notified of the permit application and been given an opportunity to request a hearing.<sup>24</sup> Saxony had requested and been granted a hearing on the issue of whether the permit will unduly impact their health or livelihood.<sup>25</sup> Three of the four days of hearing had already occurred.<sup>26</sup> But for House Bill 89, the permit would have been issued without a change in the mine plan boundary, because Saxony ultimately failed to meet its burden of production after receiving its opportunity for a full and fair hearing.<sup>27</sup>

But the Commission was required to apply the law enacted by General Assembly, so it had to deal with the change made by House Bill 89. Saxony argues that the Commission should have rejected Strack's permit application as non-compliant with House Bill 89 and required Strack to start the entire permitting process over, giving Saxony a second opportunity to challenge the

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<sup>24</sup> L.F. at 144.

<sup>25</sup> L.F. at 142.

<sup>26</sup> L.F. at 142.

<sup>27</sup> L.F. at 139-140. Saxony did not appeal the Commission's finding of no undue impairment to the circuit court.

permit and costing all the parties more time and resources.<sup>28</sup> Saxony advocated for this outcome, even though the 1,000 foot buffer was to its benefit.

Instead, the Commission found that such an extreme outcome was not necessary or warranted because it was possible to comply with the legislature's directive without starting the entire process over. Strack's property was of sufficient size that the legislative intent of creating a 1,000 foot buffer between the mine plan boundary and the school property could be accomplished.<sup>29</sup> This fact was confirmed by Strack in its Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan

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<sup>28</sup> If the Commission had adopted Saxony's request and denied Strack's permit application, then Strack would have simply submitted a new permit application with the modified mine plan boundary. Saxony would not have standing for a second hearing on the new permit application since the Commission had already determined that Saxony's health and livelihood would not be unduly impaired by the issuance of Strack's permit application with the larger mine plan boundary. Thus, Saxony's request for relief in this case affords it no substantive relief.

<sup>29</sup> L.F. at 142.

Boundary.<sup>30</sup> The General Assembly required the 1,000 foot buffer in this case and the Commission simply applied House Bill 89 when it issued Strack's permit. Because the permit issued by the Commission was authorized by law, it should be upheld.

**C. Section 444.773.3 RSMo of the Land Reclamation Act authorizes the Commission to take action to resolve the public's concerns. (Responding to Saxony's Point I.)**

Even without House Bill 89, the Commission has the authority to take action and impose permit terms in a land reclamation permit after a public hearing. Section 444.773.3 RSMo of the Land Reclamation Act allows any person to petition the Commission for a hearing prior to the issuance of a permit on the issue of whether the permit will unduly impair their health, safety or livelihood, and authorizes the Commission to grant a hearing to

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<sup>30</sup> L.F. at 82.

formally resolve concerns of the public.”<sup>31</sup> The only means by which the Commission can resolve the public’s concerns is to impose permit conditions addressing those concerns.

The Commission’s authority to impose permit conditions is supported by other provisions of the Land Reclamation Act. Section 444.789 RSMo, which establishes the procedure for the public hearing, provides that the designated hearing officer shall “hold the hearing and make *recommendations* to the commission, but the commission shall make the final decision thereon.” § 444.789 RSMo. [Emphasis added.] By authorizing the hearing officer to make more than one recommendation, the legislature authorized more than an “approve or deny” recommendation on the permit and envisioned recommendations that will resolve the public’s concerns.

Likewise, § 444.787.2 RSMo governs the enforcement of the Act and authorizes certain enforcement actions if an investigation determines that a

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<sup>31</sup> Section 444.773.3 RSMo reads in pertinent part: “If the public meeting does not resolve the concerns expressed by the public, *any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing. The land reclamation commission may grant a public hearing to formally resolve concerns of the public.*” [Emphasis added.]

surface mining operation for which a permit has been issued “is being conducted contrary to or in violation of . . . *any condition imposed on the permit. . .*” [Emphasis added.] If the Commission may enforce a permit condition, it was surely intended to impose a permit condition, as it is the permit issuing authority. § 444.773 RSMo.

These statutes authorize the Commission to impose terms and conditions to resolve public concerns raised during a public hearing. Without this authority, §§ 444.773.3 and 444.789 RSMo are rendered meaningless. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993) (each word, clause, sentence and section of a statute should be given meaning). There would be no reason to even hold a public hearing if the Commission could not resolve the concerns raised, as the legislature intended. In this case, Saxony raised several concerns related to the close proximity of Strack’s mine plan boundary, such as dust and noise.<sup>32</sup> Permit conditions resolving these concerns are statutorily authorized. Consequently, the Commission acted within its statutory authority to resolve these concerns by imposing

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<sup>32</sup> L.F. at 128 to 140.

the 1,000 foot buffer.<sup>33</sup>

Saxony relies in its opening brief upon *Mueller v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552 (Mo. App. S.D. 1995) for the proposition that the Commission may not impose permit conditions without more specific authority. *Mueller* involved an appeal of a hazardous waste permit under the Missouri Hazardous Management Law, Chapter 260, where the petitioners were challenging modifications made by Hazardous Waste Commission, *after* the permit in question had been issued and appealed. *Mueller* did not involve a comparable permitting scheme. The Missouri hazardous waste management law contains no process to allow the public to petition for a hearing *prior to* the issuance of the permit or authorizing the Hazardous Waste Commission to resolve the public's concerns through the hearing process. Compare § 444.773.3 and § 260.395.11 RSMo (*after* a

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<sup>33</sup> The Commission has resolved the public's concerns through permit conditions before. See e.g. *Lake Ozark/Osage Beach Joint Sewer Board v. Missouri Department of Natural Resources*, 326 S.W.3d 38, 40-41 (Mo. App. W.D. 2010) (land reclamation commission imposed conditions on blasting to address public's concerns about effect of quarry's blasting on nearby sewer lines).

hazardous waste permit is issued, any aggrieved person may appeal that permit to the hazardous waste commission). Because the statutory scheme for issuing a hazardous waste permit is inapposite to the statutory scheme for issuing a land reclamation permit, *Mueller* does not apply. Saxony cites no cases involving the Missouri Land Reclamation Act.

Saxony argues that if the legislature had intended for the Commission to have the authority to impose permit conditions, it would have used language similar to that used in other environmental statutes. However, the other environmental statutes that Saxony cites (air, water, solid waste and hazardous waste) all contain statutory permitting schemes that differ from the Land Reclamation Act. The Land Reclamation Act contains a process for the public to request a hearing on a *permit application*; and it alone grants a commission the power to grant a hearing request to resolve the public's concerns prior to the issuance of a permit. The other statutes contemplate

hearings and changes after a permit is issued, not before.<sup>34</sup> Because the statutory language and intent of § 444.773 RSMo is sufficiently clear to warrant the permit conditions imposed after the public hearing in this case, the Commission's decision to issue the permit as amended should be upheld.

**D. A second public notice was not required by § 444.772 RSMo because the only change to Strack's permit from the original public notice was that the mine plan acreage was reduced by 23 acres. (Responding to Saxony's Point II.)**

Section 444.772.10 RSMo of the Land Reclamation Act not only requires permit applications to be put on public notice, but specifically defines the content of the notice: the name and address of the operator, a legal description, the number of acres, a statement regarding the operator's

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<sup>34</sup> Section 260.205.19 and 260.235 RSMo (solid waste permit is issued by the department and may be appealed to the department director after issuance); § 260.395.11 RSMo (hazardous waste permit is issued by the department and may be appealed to the Missouri Hazardous Waste Commission after issuance); § 643.075.6 RSMo (air construction permit is issued by department and may be appealed to the Missouri Air Conservation Commission); and § 644.051.6 RSMo (water discharge permit is issued by department and may be appealed to the Missouri Clean Water Commission).



plan to mine a specific mineral during a specific time, and the Commission's address. Strack complied with the public notice requirement of § 444.772.10 RSMo, when it published notice of its intent to operate a 76 acre quarry.<sup>35</sup>

Saxony argues that the Commission unlawfully issued Strack's permit with the 1,000 foot buffer because there was no public notice of the reduction in acreage resulting from this change in the mine plan boundary. The Commission's 1,000 foot buffer effectively reduced the mining area to 53 acres.<sup>36</sup> But it did not leave anyone without adequate notice.

Saxony acknowledges that the only item in any second public notice that would have been changed from the first public notice, would have been that the acreage would have been reduced from 76 to 53 acres.<sup>37</sup> The Commission found that the reduction in acreage to be mined is not a change that is significant or even material to the notice requirement:

The import and intent of the notice is to permit interest person[s] to request a public meeting, a public hearing or to file written comments to the director. Nothing in a change in the mining acreage would have in any manner compromised or restricted the

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<sup>35</sup> L.F. at 125, Respondent's Exhibit 3.

<sup>36</sup> L.F. at 144.

<sup>37</sup> *Respondent Saxony's Opening Brief* at 17.

rights of interested persons under the notice. It is illogical to suggest that persons who did not challenged the original mine plan of 76 acres, would have petitioned for a hearing for a mine plan of only 53 acres and buffered from Saxony by one thousand feet. Furthermore, there is no reasonable basis to conclude that persons who were denied standing as to the original application would have been granted standing if the statutory buffer had been in place and been a part of the original application.<sup>38</sup>

The Commission's decision to not require a second public notice is consistent with *Lake Ozark/Osage Beach Joint Sewer Board v. Missouri Department of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010). In *Lake Ozark*, the petitioners were similarly appealing a Land Reclamation Commission decision to issue a land reclamation permit after a hearing under § 444.773.3 RSMo. Petitioners argued that the public notice under § 444.772.10 RSMo was inadequate because the original application packet did not include a map showing utility easements and identifying easement holders, as required by § 444.772.3 RSMo. *Lake Ozark*, 326 S.W.3d at 41-42. The court of appeals found that the failure to include this information in the public notice did not render the public notice inadequate where the

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<sup>38</sup> L.F. at 144.

petitioners “failed to demonstrate prejudice” because “only prejudicial error is reversible error.” *Id.* citing *Campbell v. Dir. of Revenue*, 297 S.W.3d 656, 659 (Mo. App. 2009).

Likewise, in this case there is no prejudice to Saxony or any other person from a *reduction* in the acreage to be mined, particularly where that reduction is caused by a 1,000 foot buffer between Saxony’s property and the area to be mined. The original public notice informed the public that the quarry acreage was to be 76 acres. This public notice covered the same 53 acres that are to be mined pursuant to the permit issued by the Commission. Because a second public notice covering the same 53 acres would have been duplicative and would not prejudice Saxony or any other potentially interested party, the Commission’s decision was reasonable, lawful, and should be upheld.

## **CONCLUSION**

The Commission’s decision to issue Strack’s permit consistent with the newly enacted provisions of § 444.771 RSMo was proper and lawful. Consequently, the Commission’s decision should be upheld and judgment entered in favor of Respondent Commission.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served via electronic filing on this 4<sup>th</sup> day of January 2013 to the following attorneys of record:

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### **RULE NO. 84.06(c) CERTIFICATION**

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,196 words.

/s/ Jennifer S. Frazier

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